Supreme Court, U.S.
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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

GABRIEL SANCHEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1.

Should Certiorari be granted because the circuit court upheld a conviction which the record shows is likely based on the theory that a telemarketing business that collects money for charity is fraudulent if a substantial percentage of the money collected is not used for charity and the fundraising arrangement is not disclosed to contributors?

A.

Is this theory illegal under this Court's recent decision in *Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003)(*Madigan*)?

B.

If *Madigan* permits conviction on this theory, was application of that rule a violation of due process because the conduct charged in this case preceded the *Madigan* decision?

2.

Should Certiorari be granted to determine whether jury instructions taken from the language in this Court's decision in *Madigan* allowing a criminal fraud jury to convict where the jury finds that the only misrepresentation was the failure to disclose the cost of fundraising, and where that cost was very high (90% of donations) require reversal under the rule of *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) and *Estelle v. McGuire,* 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)?

3.

Should Certiorari be granted because the district court refused a unanimity instruction where the jury was instructed in, and the Government argued for, conviction based on several theories, including theories which clearly contravene the First Amendment free exercise provision and IRS regulations regarding when a "church" is entitled to accept tax deductible contributions, and where the Government relied on instructions allowing the jury to convict on the basis of the high percentage cost of fundraising if anything "more" is shown?

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United States Supreme Court Rules

Rule 13.1 1

Petitioner, GABRIEL SANCHEZ, respectfully prays that a writ of certiorari issue to review the decision of a panel of the Ninth Circuit Court of Appeals, affirming his conviction of mail fraud.[1]

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit appears in the official reports at 472 F.3d 1055. The opinion was originally filed on July 17, 2006. On January 11, 2007, the Circuit Court denied Petitioner's Petition for Rehearing, but modified its opinion. The opinion of the Court of Appeals, as modified, affirming the convictions, as well as the Order denying rehearing and rehearing *en banc*, are reproduced in the Appendix at pp. 1-32.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 1254(1). The judgment of the district court was rendered on March 8, 2004. The Amended Opinion of the circuit court was filed on January 11, 2007. Under Rule 13.1 of the Rules of this Court, this Petition is timely filed.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the First Amendment to the United States Constitution and the application of several decisions of

[1] Petitioner was convicted in a jury trial of wire fraud. He was sentenced to 15 years in custody. The Ninth Circuit Court of Appeals affirmed his convictions but his sentence was vacated and remanded for possible re-sentencing pursuant to the Ninth Circuit procedure for correcting *Booker* error. Re-sentencing is pending.

this Court regarding First Amendment free speech protections in the context of a criminal fraud prosecution of defendants accused of making misrepresentations to contributors to charity.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions presented on this Petition were raised in the district court by motion and objection to jury instructions, and in the circuit court on direct appeal from judgment of conviction and addressed by the circuit court affirming Petitioner's conviction. The opinion of the Court of Appeals sets out the evidentiary framework of the case, but overlooks some evidence which is significant for an understanding of the arguments set forth here by Petitioner.

SUMMARY OF ARGUMENT

This Court should grant certiorari to clarify how its decisions in *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) ("*Schaumberg*"), *Secretary of State v. Munson*, 467 U.S. 947 (1984) ("*Munson*"), *Riley v. National Federation of Blind*, 487 U.S. 781 (1988) ("*Riley*") and *Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003) ("*Madigan*") impact the ability of the Government to prosecute persons accused of soliciting contributions for charity through the use of telemarketers who charge 90% of the money they raise to pay for the cost of fundraising, and do not volunteer this information when they solicit contributions.

Petitioner and others were indicted for mail fraud based on an alleged fraudulent scheme to solicit money for charity.

There were three categories of fraud alleged, including: (a) not using the money for charity; (b) not doing specific things with the money promised to the donors; and (c) taking donations that were not tax deductible even though donors were told they were.

The trial revealed that the Government's first theory was really not that no money had been spent on charity, but that in the opinion of the prosecutors, not enough money had been spent on charity, largely because approximately 90% of the money collected was paid to fund raisers who worked on commission and this was not told to the donors, and because out of the remaining money, Petitioner paid for overhead costs, such as office rent, utilities, salaries and his own modest salary.

Although the evidence supported the claim that donors were told their contributions were tax deductible under IRS Code Section 503(c)(3), the Government completely failed to prove that this was false, but instead sought to convince the jury that Petitioner's duly incorporated religious entity that called itself a church should, morally, not have been allowed to use that status, even though under the law the entity was, for IRS tax exemption purposes, a "church", entitled to accept deductible donations.

The Government's case was plagued with constitutional problems because the prosecution chose to argue that the percentage of money collected going to fund raising and overhead established that the church and charities operating under it were fraudulent. The district court admitted a mountain of evidence of the amount of money that was collected and spent on overhead and fund raising, and then instructed the jury in such a manner that permitted it to convict on an unconstitutional theory. In addition, there was no unanimity instruction, although the jury was likely confused about which of the disparate Government theories made up the alleged scheme to defraud, and the theory based on telling

donors their contributions were tax deductible was contrary to law, because a church is automatically entitled to tax free contributions unless and until it has been determined not to qualify as tax exempt by the IRS, which never happened in this case.

The acts alleged all took place prior to this Court's decision in *Madigan*, however, the district court instructed the jury, over Petitioner's objection relying on an excerpt of the language this Court used in *Madigan* itself, in such a manner that actually permitted the jury to utilize the combination of high percentage fundraising and failure to disclose that percentage as a sufficient independent basis for finding that the defendants engaged in fraud. Moreover, although there was unrebutted evidence that some money collected was spent on charity work, the Government alleged in its indictment that none went to charity, but then argued that in its opinion, not enough of the money collected did.

The district court and the Ninth Circuit appear to have concluded that in *Madigan* this Court retreated, to some degree, from the holdings in *Riley* and *Munson*, regarding the prohibition on an individual prosecutor doing on a case by case basis what the legislature may not do by statute – i.e., to criminalize charitable fundraising based on the percentage of the money collected going to charity, or based on the failure to disclose (if not asked) what percentage of the money donated goes to charity vs. overhead, based on language in *Madigan* stating that a finding of fraud cannot constitutionally be based solely on either of these factors.

Clarification is sorely needed because in this case the district court instructed the jury that it could not convict of fraud based on the high cost of fundraising, *without more*, and it could not convict solely based on the failure to inform the jury of the high cost of fund raising *without more*, but its instructions did not preclude the jury from considering the

presence of *both* high fundraising costs *and* the failure to disclose this to the donors to be sufficient, by itself to establish fraud.

In view of the fact that the Government argued these things were material and constituted fraud *because* it proved that donors would never have contributed money to Petitioner if they had known that less than 10% of their donation would go to charity (because 90% went to telemarketers and additional sums paid Petitioner's overhead), it is apparent that by utilizing some of the language from *Madigan*, the district court and the Government have retroactively expanded the reach of allegations of fraudulent charitable solicitations into areas that were previously protected conduct under the First Amendment under pre-*Madigan* cases, including *Munson*, *Riley*, and *Schaumberg*.

Given the instructions here that allowed the jury to convict solely on the basis of the combination of high fund raising costs and the failure to disclose those high costs to donors, if this Court did not intend to expand the basis on which a criminal fraud conviction could be sustained to include that situation, then Certiorari should be granted to establish that fact. There is a substantial likelihood that the jury here understood the law to permit a conviction solely on that basis which is an unconstitutional theory of guilt, requiring reversal under *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) and *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

On the other hand, if this is what this Court intended in *Madigan*, then certiorari should be granted to establish that when prosecuting pre-*Madigan* solicitation fraud, the Government cannot utilize this new expanded basis for such prosecutions because retroactively allowing prosecution of conduct that was previously held to be protected by the First Amendment violates due process.

Finally, this case demonstrates why this Court should establish a requirement for a unanimity instruction to protect the defendant's substantial right to a unanimous jury verdict as granted by Article III, § 2, and the Sixth Amendment of the United States Constitution, where, as here, there are multiple factual theories advanced by the Government. In this case there is a grave risk that the jury has convicted of fraud even though the jury did not unanimously find that any one theory supporting a finding of solicitation fraud was proven.

ARGUMENT

1.

Certiorari should be granted because the circuit court upheld a conviction which the record shows is likely based on the theory that a telemarketing business that collects money for charity is fraudulent if a substantial percentage of the money collected is not used for charity and the fundraising arrangement is not disclosed to contributors.

It is well established that solicitation is a form of protected speech.[2]

In *Riley* this Court also made it clear that the legislature could not make a law that defined as fraudulent speech, solicitation that failed to disclose to a prospective contributor the percentage of the donation that would go to the cost of fundraising, nor could fraud be defined in terms of what that percentage happens to be. *Riley*, and *Munson* recognized that start up churches and charities which have no name recognition have difficulty obtaining contributions and that the costs of

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[2] *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S.Ct. 2701, 2705; *Riley*, 487 U.S. at 788-789; *Schaumburg*, 444 U.S. at 629; *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943)

legitimate fundraising frequently requires an extraordinary percentage of the money collected to go to the cost of the fundraising itself. Petitioner reads these cases as holding that the First Amendment protects the right of persons soliciting for such groups to do so even though the fundraising costs are enormous, and even though those costs are not disclosed to a donor (unless the donor inquires into the cost of fundraising).

In this case, however, the Government alleged fraudulent solicitation in its indictment and made the fact that 90% of the money collected went to pay telemarketers fees, and the fact that this was not disclosed to donators (who did not inquire) a significant part of their theory that the solicitations were in fact fraudulent and thus not protected.

The circuit court concluded that in *Madigan* this Court has re-written the First Amendment prohibition on basing a theory of fraud on either or both the percentage of donations going to fundraising or the disclosure of that percentage. The court below (and several other circuit and district courts) have liberally quoted from *Madigan* where this Court stated that the First Amendment does not shield fraud.

Clearly, the lower courts have seized upon this language as a signal that the holdings of *Munson*, *Riley*, and *Schaumberg*, do not apply in criminal cases at all.[3]

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[3] See e.g., *United States v. Wenger*, 427 F.3d 840, 850 (10th Cir. 2005) ["It is undisputed that the government has an interest in protecting consumers from being misled. (Quoting *Madigan.*, 538 U.S. 600, 612 ('[T]he First Amendment does not shield fraud.')."]; *United States v. Hempfling*, 431 F.Supp.2d 1069, 1083 (ED Cal 2006) ["The Supreme Court has repeatedly held that the First Amendment does not shield fraud. (Citing *Madigan*, 538 U.S. 600, 612), and *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)(an 'intentional lie' plays 'no essential part of any exposition of ideas.')."]; *United States v. Philip Morris USA, Inc.*, 337 F.Supp.2d 15, 25 (DC Dist 2004) ["The Supreme Court has recently reiterated, albeit in a different factual context, that 'the First Amendment does not shield fraud.' * * * In *Madigan*, the Court held that '[w]hat the First Amendment ... emphatically do[es] not require ... is a

(continued...)

The Ninth Circuit wrote in its opinion in this case, referring to the rule of the above three decisions:

> "The limit of this principle may be seen in *Madigan's* holding that when 'nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener,' the high cost of fundraising may be introduced as evidence of fraud in a criminal case. 538 U.S. at 606, 123 S.Ct. 1829." App. 16-17 (Underlining supplied.).

Assuming evidence of these things are admissible in a criminal case, Petitioner believes these things still are off limits from a First Amendment perspective as a basis for conviction of fraud, and here they formed a major part of the Government's theory of guilt.

In the first place, this Court has held that solicitation is protected speech because those who contribute are in fact exercising choices protected by free speech.

In *Riley* and *Munson* this Court extended such protection, holding that the First Amendment prohibits laws that do not ban, but instead only regulate the terms upon which telemarketers are retained. If the First Amendment prohibits a state from restricting how much of the money collected for charity can be paid to fund raisers, then how can the

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[3](...continued)
blanket exemption from fraud liability for a [defendant] who intentionally misleads [his audience].' *Id.* at 1831; *see also Gertz v. Robert Welch, Inc., supra*, 418 U.S. 323, 340 ('the intentional lie [does not] materially advance society's interest in uninhibited, robust, and wide-open debate on public issues')."]; *United States v. Rybicki*, 354 F.3d 124, 150-151 (2d Cir. 2003) ["The conduct at issue--fraud--enjoys no constitutional protection, whether the deceitful scheme is aimed at a victim's property or at his intangible right to honest services. *See Plumley v. Massachusetts*, 155 U.S. 461, 479, 15 S.Ct. 154, 39 L.Ed. 223 (1894) ('The constitution of the United States does not secure to any one the privilege of defrauding the public.')"; also citing *Madigan* (noting that fraud is not conduct protected by the First Amendment).]. (See also, *United States v. Philip Morris USA, Inc.*, - F.Supp.2d - (Part 5), 2006 WL 2380650, at *179 (DC Dist. 2006) [same].)

Government use the fact that a high percentage of funds collected did not go to charity but were paid to fund raisers as evidence of fraud without violating the First Amendment? The court below felt totally unconstrained from holding that they could not, solely because the Government also alleged other false statements were made by the defendants. (See App. 17-19 generally.)

> "Neither *Madigan* nor the First Amendment insulates defendants from criminal prosecution for fraudulent misrepresentations about their charitable endeavors. Rather, the government is constrained from charging that high fundraising costs *per se* are tantamount to fraud." (App. 19. Underlining supplied.)

A.

This theory of fraud is still illegal under this Court's recent decision in *Madigan.*

Certiorari should be granted to determine whether as the Ninth Circuit ruled, this is the limit of the *Madigan* decision, or whether, as Petitioner contends, *Riley*, and the other pre-*Madigan* cases, continue to prohibit basing a conclusion that solicitations are fraudulent on the fact that the donors did not know about the high percentage of their money that would be going to fund raising.

The principle that the First Amendment does not shield fraud is not a new concept, first set down in *Madigan*. Nor does it weaken the First Amendment holdings of prior solicitation cases. Of course, no one has a First Amendment privilege to commit a crime, including fraud. But the legitimate governmental interest in preventing fraud and protecting citizens from it was fully recognized by this Court when it decided the earlier cases circumscribing legislative

rules making fraudulent, or illegal, high cost of fundraising and non-disclosure of those high costs. In fact, courts, including this Court, have "repeatedly held that the prevention of fraud in charitable solicitation is a substantial interest that the government is entitled to protect, *Riley,* 487 U.S. at 792, 108 S.Ct. 2667; *Schaumburg,* 444 U.S. at 636, 100 S.Ct. 826; *Telco,* 885 F.2d at 1231; *Lucas,* 856 F.Supp. at 271, . . ." *National Federation of the Blind v. Federal Trade Commission*, 303 F.Supp.2d 707, 720 (D. Md. 2004)

Even while recognizing this principle, however, in *Madigan,* this Court wrote the state attorney general could not constitutionally do what the federal prosecutor has done in this case:

> "For example, had the complaint against Telemarketers charged fraud based solely on the percentage of donations the fundraisers would retain, or their failure to alert potential donors to their fee arrangements as the start of each phone call, *Riley* would support swift dismissal. A State's Attorney General surely cannot gain case-by-case ground this Court has declared off limits to legislators." (538 U.S. at 617, Underlining supplied.)

In the present case, although the Government did, in the indictment, allege that the defendants misled contributors in other ways, besides not informing them of the high cost of the fundraising itself, the Government used, as its strongest argument, the contrast between the high percentage the money collected going to fundraising and the very small amount left over for charity. The Government told the jury that Petitioner was guilty because not enough money went to charity.

The Government's argument in this regard was a combination of an appeal to emotion, and an assertion that no money went to charity, blended with an admission that some did, but far too little. The prosecutor did, however, have to

admit that a large sum of money collected was not spent by Petitioner for his "personal benefit." "But, as you've heard, there was some money left over." (Referring to the approximately $140,000 left in the accounts of the charities.) The Government did not explain why a person who was (allegedly) only in this business for personal gain did not take that money with him when he left the organization. If he was truly engaged in a scheme to line his own pockets, why would he not take over almost $140,000 in cash with him when he left? Also conspicuously absent from this alleged $7 million scheme to defraud is any evidence of a lavish life style, or expensive possessions purchased by Petitioner during the years in question. Why, in fact, would a person choose as a scam a scheme that cost up to and at times over 90% of the money collected just to pay the people soliciting the funds? Although the Government alleges a scheme from 1993 to 2002 over which approximately $7 million was collected, that translates into only $700,000 going into the accounts of the charities over 9 years, less the $140,000 Petitioner left behind when he departed from the charities. On average, that means that approximately $76,300 went to the charities per year, before ordinary overhead expenses, which included Petitioner's salary, rent for the office, utilities, and staff salaries. While the remaining money for charity was at times small, that alone clearly does not show this was a scam charity scheme to defraud donors.

Ending with a play to the jurors' emotions that violated the *Riley* principle, the prosecutor asked the jurors to "just think what $7 million could have done for veterans and handicapped youth and children with AIDS and families of slain police officers." (ER, 122:23-25)

This argument is a violation of the First Amendment as this Court has enunciated it in *Munson*, *Riley*, and *Schaumberg* because in those cases, this Court has held that: "there is no

nexus between the percentage of funds retained by the fund raiser and the likelihood that the solicitation is fraud." (*Riley*, at 487 U.S. at 793); "[it is a] fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." (*Munson*, 467 U.S. at 966).

Added to this aspect of this case, which Petitioner views as violating the rules that survived *Madigan's* recognition that the First Amendment does not shield fraud, is the materiality aspect of this case.

One of the Government's primary ways of proving that the deceptions of the defendants were "material" was to repeatedly ask donors whether, if they had known that such a large percentage of their donations went to telemarketers, they would have donated in the first place. These donors testified that they were told the contributions would be tax deductible (e.g., Borland, 10/21-II, 83-89; Rockey, 10/22-I, 28-36) and that they would not have contributed if they were told less than 10% of their donation went toward the charity. (E.g., Ambrosius, 10/21-II5, Borland, 10/21-II, 83-89)

In argument the Government read an the instruction saying, "A defendant's actions can constitute a scheme to defraud even if there are no specific false statements involved. . . ." (ER, 121:24-122:1) And then, ". . . you just need to find enough to show that this was a scheme to defraud. And that's something that you figure in your own mind." (ER, 121:16-18).

This was an invitation to the jurors to, individually, and not as a group, come up with whatever each of the jurors thought made this a scheme to defraud, without reference to any particular false statement. It could even be based on something that was <u>not said</u>. The prosecutor argued: "The deception need not be premised on affirmative words or statements standing alone." (ER, 121:1-4) In other words, it could be based on the fact that the donors were <u>not told about</u>

the high cost of fund raising, combined with the fact that the cost was very high, which is something that donors were unhappy to learn later.

This violates the holding of *Riley*, and the cases that preceded it, because it was affirmatively telling the jury that they could base their verdict that Petitioner engaged in fraud *on the high cost of fundraising and the fact he did not tell the donors about the high cost of fundraising.*

Government's Argument on Why the Jury Should Conclude Petitioner's Church Was Not a Church under IRS Code Section 503(c)(3).

1. An appeal to the juror's moral judgment: "you have heard evidence of an amoral and cynical scheme to defraud . . ." Their "reprehensible behavior and theft" makes them guilty.

2. In the opinion of other people "Petitioner was not a church": The Government argued witness Diana Mercurio told the jurors "they decided Mr. Sanchez would have a church because . . . a church provides protection from the IRS . . ." (ER, 70:8-12) The Government then addressed whether or not Petitioner had a "strong religious feeling" and concluded that based on Diana Mercurio's opinion that he did not.

Although conceding that a witness had testified that she had "talked religion to [Petitioner]" the Government questioned Petitioner's "sincerity" "in his church" asking the jury in argument:"Maybe he's a religious man, but did he have a church?" If he was so honest and true, why didn't he file his (personal) income taxes? If you cheat on one kind of taxes, you're cheating on the other."

The Government's argument that Petitioner "was not a church" came down to the testimony of four witnesses who expressed the opinion that he "wasn't a church." Of those four, one, the Government had to concede, said, "yeah, he was religious [but] he wasn't a church."

3. In the opinion of the prosecutor, "religious feelings" do not equal a church: While conceding that Petitioner may have had genuine religious motives to help others, the Government sought to condemn him for forming a legal religious entity.

> "Even if he is religious, even if he really did want to help others, why in the world did he need a corporate entity complete with 501(c)(3) language in the incorporation papers to do it? If you want to go do charity work, just go do charity work. The church was nothing at all – not a place, not even a listed phone number, nothing but a tax dodge, nothing but a shell."

The prosecutor chided Petitioner, saying he was not a "sincere minister" or he would "go out under First Church of Life and do your ministering."

4. The "church" was not listed in the phone book: "If he was really a sincere church, if he was really trying to minister to people and help them and it wasn't just a tax dodge, why wasn't the church listed in the phone book? If he wanted people to come to him, why wasn't that church listed?"

The prosecutor then mocked Petitioner's response to this question when he was on the stand, "He said the body of Christ is not listed in the phone book."

Of course, virtually all churches that collect money for their charitable programs are entitled to this protection and they all form legal churches for that reason. No such legal formalities are needed to simply pray or worship, but in this nation churches form legal religious entities for precisely this reason.

But the law has long been very clear that one man's opinion of another's religious beliefs or "feelings" as legitimate or not legitimate has no place in the courts or in a criminal prosecution of the person whose religious "feelings" or beliefs

are being questioned by prosecution authorities.

In *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) three members of a religious group were convicted under a statute prohibiting sales by religious groups for selling books, distributing pamphlets, and soliciting contributions or donations. This Court set aside the convictions, holding that although a "general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection," *id.*, at 305, 60 S.Ct. at 904, it violates the First Amendment to "condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause," *id.*, at 307, 60 S.Ct., at 904- 905.

In *Schaumberg*, this Court cited *Cantwell* for the proposition that any determination by state authority as to what is a religious cause is "considered to be an invalid prior restraint on the free exercise of religion." (*Schaumberg*, 444 U.S. at 629)

"Although *Cantwell* turned on the free exercise clause, this Court has subsequently understood *Cantwell* to have implied that soliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363, 97 S.Ct. 2691, 2698, 56 L.Ed.2d 810 (1977)." (*Schaumberg*, 444 U.S. at 629)

The above excerpted argument of the Government in this case clearly amounts to the prosecutor telling the jury what, in her opinion, constitutes a religion, and just as clearly, it appears to violate the free exercise clause of the First Amendment. Moreover, this was a critical aspect of the Government's

argument in this case because one of the three bases the jury was offered by convicting Petitioner of fraud was to conclude that it was false that donor contributions were tax deductible under IRS Code Section 503(c).

Petitioner submits that whether or not a person, or a legal entity he forms "is a church," morally, is not a matter of opinion of others, nor a matter for a jury to determine based on the moral disapprobation of the Government's lawyers, nor based on any list of traditional criteria that make it "a church."[4]

Moreover, as was ultimately clear to the district court and trial attorneys – even if it never became clear to the jury – under the IRS rules and regulations, a church entity is Section 503(c)(3) exempt unless and until the IRS determines otherwise, and here there was no evidence that the IRS had determined otherwise any time prior to the trial in this case. Certainly there was never any evidence that the IRS had either determined that the entities here were not Section 503(c)(3) exempt during the period covered by the indictment, or that the IRS had communicated any such determination to Petitioner or anyone associated with him during that period.

Although IRS Agent Thomas Miller testified that if the IRS conducted an inquiry into the status of Petitioner's church the result would be that he would not qualify as a church in which case donations to it would not be tax deductible, he did not testify that there was or ever had been such an inquiry. (10/28-I, 52-53)

Under Title 26 U.S.C. § 7611(h), however, there was no need for Petitioner to apply to the IRS or to otherwise "register" with the IRS as a tax exempt church. "Any

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[4] The prosecutor invited the jurors to judge whether or not Petitioner was, indeed, a church based on factors on which a traditional church might be defined. (I.e., "Services, Congregation, Religious education." (ER, 98:3-5)

organization claiming to be a church *is* a church, exempt from the tax laws under Title 26 U.S.C. § 501(a)." Absent IRS notice to the church pursuant to Title 26 U.S.C. § 7611(a), of which there was no evidence in this case, the organizations which the Indictment alleged were not allowed to accept tax deductible donations under Section 503(c)(3) were, as a matter of law, allowed to do so.

Thus, the third category of alleged false statements, that the donations were tax deductible under IRS Code Section 503(c)(3), was demonstrated by the record to be legally false because, although there was substantial evidence that donors were told their donations were tax deductible under that section, as a matter of law they were.

In other words, as to this category of "misrepresentations", the Government engaged in a sort of bait and switch presentation. First the Government said it was a lie to tell donors that their contributions were tax deductible. Then the evidence the Government presented was merely that *if the* IRS *had* conducted an inquiry into the entity, it *would have found* the entity not to meet its subsequently[5] promulgated list of criteria for determining if an entity is a church. Using this evidence, the Government then argued that the jury should set up its own standard for what constitutes a church, and to conclude that Petitioner's religious corporation was not a church, and therefore not entitled to tax exempt status. Of course, he was not prosecuted for tax evasion, and he could not have been because his entity enjoyed actual tax exempt status when the fundraisers correctly told his donors their contributions were tax deductible, because the entity is presumed to be a church for income tax purposes unless and until the IRS gives it notice to the contrary. (See 26 U.S.C. § 7611(h).)

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[5] I.e., after the date of the indictment in this case.

This aspect of the case demonstrates that the Government was not basing its case of fraud on solid allegations of misrepresentations backed up by solid evidence, but, instead, on a few anecdotal allegations of misrepresentations, combined with the opinion of some workers that not much charity work was really going on, and by placing great emphasis on the fact that donors would not have given money if they had known that less than 10% of their donation was going to charity, combined with a false theory that it was untrue that the donations were tax deductible under IRS Code Section 503(c) because in the opinion of the Government (and surely, ultimately, the jury), Petitioner's "church" was not a genuine church, despite the fact that under the IRS law, it did qualify as one, and so the donations were tax deductible. Certainly no evidence ever established that they were not, and despite an exhortation in his Petition for Rehearing below, the Ninth Circuit continued to totally ignore this issue on appeal.

Petitioner was prosecuted in violation of the First Amendment, despite the Government's allegation that in addition to not spending enough of the money collected on charity, and in addition to not informing donors of the high percentage cost of fundraising, and in addition to falsely telling them their donations were tax deductible, his brochures (given to donors *after they donated*) and the scripts used by telemarketers as to how the types of charity work their donations would be used for, were also misleading.

Certiorari should be granted to establish that *Madigan* did not pull down the curtain on First Amendment protection for charitable solicitations merely because some prosecution entity labels them fraudulent. What is protected activity (i.e., paying high costs for fundraising, and not volunteering that fact when soliciting contributions) retains its protected status, even if other alleged conduct of solicitors is fraudulent.

B.

If *Madigan* permits conviction on this theory, application of that rule was a violation of due process because the conduct charged in this case preceded the *Madigan* decision

Although this issue was clearly raised by Petitioner in the Ninth Circuit, the circuit court virtually ignored it, other than to say, after holding the *Madigan* rendered the present prosecution proper:

> "*Riley* foreshadowed this result by noting that fraud prosecutions were 'narrowly tailored' enough to be in 'keeping with First Amendment directives,' and that 'the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements.' 487 U.S. at 800, 108 S.Ct. 2667." App. 17.

Petitioner urges this Court to grant certiorari to determine whether or not *Riley,* which explicitly held certain conduct could not constitutionally be prohibited or defined as fraud, "foreshadowed" the rule the Ninth Circuit adopted, which was to permit the jury to be told that high cost of fundraising and non-disclosure of those costs were in fact evidence of fraud.

In this case, the Government went so far as to pin its theory of materiality on the fact that numerous donors testified that they would not have contributed if they had been informed of the high cost of fundraising, and then exhorted the jury to convict by considering how much good the millions that went to fundraising could have done if it had gone to charity as the defendant's told the donors, exhorting the jurors to "<u>just think what $7 million could have done for veterans and handicapped youth and children with AIDS and families of slain police officers</u>." (ER, 122:23-25)

Assuming (but not conceding) that under *Madigan*, this argument and this theory of fraud did not violate the First

Amendment, certiorari should still be granted because the indictment concerned events that all took place before this Court decided *Madigan*.

The decision of the Ninth Circuit here violated this Court's due process rule established in *Bouie v. City of Columbia*, 378 U.S. 347, 353-354, 12 L.Ed.2d 894, 84 S.Ct. 1697. 1702-1703 (1964); *Marks v. United States*, 430 U.S. 188, 191-192, 51 L.Ed.2d 260, 97 S.Ct. 990, 992-993 (1977); and *Rabe v. Washington*, 405 U.S. 313, 93 S.Ct. 993, 31 L.Ed.2d 258 (1972).)

In *Bouie v. City of Columbia*, *supra*, 378 U.S. 347, 353-354, 12 L.Ed.2d 894, 84 S.Ct. 1697. 1702-1703 this Court held: "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. Id., at 61." [Underlining supplied.]

In *Marks v. United States*, *supra*, 430 U.S. 188, 191-192, 51 L.Ed.2d 260, 97 S.Ct. 990, 992-993, this Court held (citing) *Bouie*, *supra*:

> "[T]he principle on which the [Ex Post Facto] Clause is based, the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty. (Cites omitted.) . . . As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment."

The question that remains in order to determine if due process was violated when the district court allowed the Government to use the high cost of fundraising, as an integral (if not exclusive) basis of its fraud theory here, is whether or not the rule of *Madigan*, as the panel of the Ninth Circuit read it, was "foreseeble." (*Bouie v. City of Columbia*, *supra*, 378 U.S. at 353.)

Despite the fact that Petitioner briefed this issue in his principle briefs and in his rehearing petition, the Ninth Circuit did not address it other than to say, in passing, as noted above, that it believed this Court's decision in *Riley* "foreshadowed" the holding in *Madigan*, because there, the following words appear: 'the State may vigorously enforce its anti-fraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements.'

Respectfully, Petitioner simply does not understand how this could logically be viewed as giving anyone who was familiar with *Riley*, (and *Munson* and *Schaumberg*) notice that while the First Amendment protects solicitations, and while that protection extends to high fund raising costs, and to the right not to volunteer the amount of those costs, precisely those protected aspects of solicitation can become a theory of fraud if the Government also alleges that solicitors are making other material false statements to the donors.

As noted above, Petitioner does not even believe that this Court has held in *Madigan* that is it permissible to include high fundraising costs as evidence of fraud. But even if it did, surely there is nothing in *Riley* that would exempt the change in the interpretation of the First Amendment when fraud is *alleged* from the anti-retroactivity rules clearly set down in this Court's prior due process jurisprudence in *Bouie* and *Marks*.

If this Court concludes that *Madigan* is exempted from First Amendment protection, solicitors paying high fundraising costs, and not volunteering that fact, when fraud is alleged, and thereby expanded the basis on which fraudulent solicitation can constitutionally be proven, Certiorari should be granted to determine whether that rule can be retroactively applied to solicitations carried out prior to the decision in *Madigan* such as the ones alleged in this case.

2.

Certiorari should be granted to determine whether jury instructions taken from the language in this Court's decision in *Madigan* allowing a criminal fraud jury to convict where the jury finds that the only misrepresentations was the failure to disclose the cost of fundraising, where that cost was very high(90% of donations) require reversal under the rule of *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) and *Estelle v. McGuire, supra,* 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

In the district court, and again in the circuit court, Petitioner objected to instructions that used the phrase "without more" when informing the jury that high fundraising costs "without more" could not form the basis of a fraud conviction, and that failure to disclose the percentage cost of fundraising "without more" could not form the basis of a fraud conviction.

These instructions left open the very real possibility that the jury would conclude that while neither of these (First Amendment protected activities) could alone be the basis of a conviction, if both were present (as they are here), that is sufficient to convict.

The Ninth Circuit rejected this argument in part by ignoring it,[6] and in part by noting that the district court's instructions could not be objectionable because they used language directly out of this Court's decision in *Madigan*. "The difficulty with their challenge is that the court's

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[6] Contrary to the implication of the Opinion, Petitioner did not limit his objection to a claim that the district court erroneously permitted the Government to use the high cost of fundraising as evidence of fraud. Petitioner argued in a clear manner in his opening and reply briefs that the combination of instructions erroneously permitted the jury to conclude that while the high cost of fundraising alone, and the failure to disclose the high cost of fund raising alone is insufficient to establish fraud, in the context of the argument made here, the combination of the two can be sufficient. This issue was raised as argument no. 5 in Sanchez' Opening Brief. (See AOB, pp. 50-55.)

instruction was a nearly verbatim quotation from *Madigan. See* 538 U.S. at 624, 123 S.Ct. 1829." (App. 23.)

Petitioner believes that this Court's decisions are designed to be read by lawyers and judges of the district courts and courts of appeal. This audience has been referred to by one court as "well-trained professionals, skilled in reading legal texts."[7] Thus, the mere fact that a jury instruction used the words this Court has written in its opinion in no way insulates it from the argument raised by Petitioner in his briefs in the court below, based on the rule of *Boyde v. California* and *Estelle.*

A jury instruction can violate due process and require reversal whereas here, there is a reasonable likelihood that the jury understood it in an unconstitutional manner. The standard for reviewing an ambiguous instruction has been set forth by this Court: "[W]e inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire, supra,* 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (citation omitted).

The test stated in *Estelle* for ambiguous instructions was first articulated in deciding an Eighth Amendment challenge to a jury instruction in *Boyde v. California, supra,* 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316, but *Estelle* employed the test to decide a Due Process Clause challenge to a jury instruction outside the Eighth Amendment context. *Estelle,* 502 U.S. at 66- 67, 112 S.Ct. 475. *Estelle* made a point of stating that its articulation and application of the test was established law. ["We . . . reaffirm the standard set out in *Boyde.*"] *Estelle,* 502 U.S. at 73 n. 4, 112 S.Ct. 475; *see also Middleton v. McNeil,* 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701

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[7] See *Sarausad v. Porter,* 479 F.3d 671, 2007 WL 675991 (9th Cir. 2007), Bybee, J., dissenting).

(2004) (per curiam) (applying the established rule that "a jury instruction violates due process if ... there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution") (internal quotation marks omitted)

In *Estelle* this Court emphasized that, in determining whether there was a "reasonable likelihood" of misunderstanding, "the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle,* 502 U.S. at 72, 112 S.Ct. 475 (quoting *Cupp v. Naughten,* 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)).

This Court in *Boyde* also noted that "arguments of counsel generally carry less weight with a jury than do instructions from the court," but they may sometimes "have a decisive effect on the jury." *Boyde,* 494 U.S. at 384, 110 S.Ct. 1190.

Here, contrary to the inference of the Ninth Circuit, there was substantial emphasis by the prosecutor on the percentage of the donations used for fundraising, and on two other improper considerations in the prosecutor's argument. (See *anti*, pp. 14-16, 24.)

Indeed, the instructions themselves allowed the jurors to convict using nothing other than high fundraising costs and failure to disclose those costs, because each of those items constituted "something more" than either one of them alone.

Moreover, the prosecutor exhorted each juror to decide what constituted an intent and a scheme to defraud in his or her own mind. Thus, the Government told the jury: ". . . you just need to find enough to show that this was a scheme to defraud. And that's something that you figure in your own mind. * * * A defendant's actions can constitute a scheme to defraud even if there are no specific false statements involved. . . ." (ER, 121:16-18, 121:24-122:1)

The only aspect of this case that the prosecutor could have been referring to in this part of her argument was the fundraising aspect, because it was the Government's contention that the other two aspects of the case (i.e., advising contributors of the tax deductible nature of their donations and not spending on the specific types of charity work mentioned) were in fact "false statements." The Government never alleged, however, that the solicitors lied to donors about the amount of money being spent on fundraising.

As noted, however, the Government *did* emphasize that donors would never have contributed if they had been informed of the fact that less than 10% of their money would actually go to charity. The Government repeatedly inquired of its donor witnesses whether they would have contributed if they had known that 90% of the donation was going to fund raising.

In addition, the Government argued to the jury that "we know right off the top that 90 percent of it went to N.A.A." (ER, 78:19-20). After telling the jury it could not base its conviction "solely on that 90 percent number" the prosecutor told them that "without more language" the court's instruction meant they were "perfectly entitled to consider that as part of the overall scheme to defraud." (ER, 77:3-6)

The prosecutor then proceeded to explain to the jury why 90% going to fund raising was "not the norm for the vast range of charities" and that when 90% is going to fund raising, "it is false to say later on as a justification", "Oh, this money was for charity." (ER, 78:8-9). The prosecutor then, immediately, coupled the concept that the fact that 90% of the money went to fund raising was evidence the jury should consider as part of the overall scheme to defraud with the fact that donors were never told "that the money that they gave would be used to contact more donors to get more money from them in the name of [Petitioner's] (ER, 78:14-20).

In other words, the prosecutor, in argument, clearly linked the fact that 90 percent of the funds raised went to fund raising with the fact that this percentage was not disclosed to the donors.

The court's instructions to the jury on the two subjects of the percentage of money donated and the failure to voluntarily disclose that percentage are as follows: "High fund-raising costs without more do not establish fraud. And mere failure to volunteer the fund-raiser's fee when contacting a potential donee without more is insufficient to establish fraud." (ER, 58:19-22).

However, as argued, the Government told the jury that this was not a case of "high fund-raising costs" without more, nor was it a case of "mere failure to volunteer the fund-raiser's costs" without more. According to the Government, there was "more" here. For here, both of these were present.

As argued, the jury was free to conclude that the combination of 90% fund raising costs and the failure to disclose that fact to the donors prior when contacting them is sufficient to prove fraud.

The Government's repeated questioning of the donors themselves as to whether or not they would have contributed if they had been informed of the high fund raising costs, together with the Government's emphasis on this aspect of the case in argument, clearly renders these instructions violative of due process.

In fact, even while conceding that it was untrue that no money went to charity, the prosecutor denigrated what she admitted was given to charity and ended her argument by re-emphasizing the percentage that did not.

> "The bottom line is that $7 million was raised just from Mr. Sanchez's charities. And what's to show for that? A few truckloads of blankets? Some fire extinguishers? [¶] Just think what $7 million

> could have done for veterans and handicapped youth and children with AIDS and the families of slain police officers. What could that money have done? [¶] And instead, it went into the pockets of these men and the telemarketers that did their dirty work for them." ER, 122:19-123:3

This argument ensured that the jury instructions complained of here would be prejudicial by inviting the jury to convict on the basis of precisely the emotional argument that the this Court condemned in *Riley*.

Moreover, even in *Madigan* this Court did not approve of allowing the government or the jury to use the percentage of funds donated going to fund raising and/or charity overhead as proof of fraud, absent misrepresentations about that percentage. "So long as the emphasis is on what the fundraisers misleadingly convey, and not on percentage limitations on solicitors' fees *per se*, such actions need not impermissibly chill protected speech." *Id.*, at p. 619.

Here, of course, the combination of the jury instructions telling jurors they could find fraud if there was proof of high fund raising costs, together with something more, and telling them they could find fraud if those costs were not volunteered, was the final emphasis of the prosecutor's emotional argument to the jury. It told the jury to convict the defendants *because* that $7 million did not go to charity but in large part went into "the pockets of these men and the telemarketers that did their dirty work for them." (ER, 123-123)

Finally, the jury was instructed that "evidence beyond a reasonable doubt that a scheme was reasonably calculated to deceive is sufficient to establish a scheme to defraud." (ER, 58:1-3). This objected to instruction was likely to be understood by the jury to mean they could conclude that the defendant's use of high fundraising costs and not telling donors about that was "reasonably calculated to deceive" the donors,

and was therefore sufficient to establish a scheme to defraud. In short, the Government shamed the jurors into convicting because so little money actually went to the charities involved, not because none did.

Given the overall evidence and arguments in this case and given the instructions taken as a whole, the jury was misled into believing it could and should convict if the donors were "deceived" about the percentage of the contributions that went to fund raising, even though nothing was affirmatively said to them about that subject. Certiorari should be granted to establish that *Madigan* does not authorize the instructions used here.

3.

Certiorari should be granted because the district court refused a unanimity instruction where the jury was instructed in, and the Government argued for, conviction based on several theories, including theories which clearly contravene the First Amendment free exercise provision and IRS regulations regarding when a "church" is entitled to accept tax deductible contributions, and where the Government's relied on instructions allowing the jury to convict on the basis of the high percentage cost of fundraising if anything "more" is shown.

In this case the Government proceeded on several theories of fraud and the jury was free to use one or two or parts of one or another theory to convict, even if each juror decided that fraud was proven based on facts that other jurors did not believe were proven beyond a reasonable doubt. The ambiguity of the indictment and instruction prejudiced the Petitioner's substantial right to a unanimous jury verdict as granted by Article III, § 2, and the Sixth Amendment of the United States Constitution.

Although this Court has not established that unanimity instructions are required as a matter of due process, Petitioner urges this Court to grant Certiorari to reconsider its decision in that regard because this case demonstrates how a person could be convicted even if some jurors believe he is engaging only in conduct that is protected speech, because the Government was permitted to use a multiple theory prosecution, and not required to convince all of the jurors that the defendants were guilty on any one of those theories.

This Court has held a defendant cannot constitutionally be sentenced to a minimum sentence based on sentencing factors not found to be true by a unanimous jury beyond a reasonable doubt (See e.g., *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) "['[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that '*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours ....'" 530 U.S., at 477, 120 S.Ct. 2348 (citations omitted).]

Here, however, the jury was permitted to convict and the district court permitted to sentence Petitioner for something that jurors were not required to unanimously agree he did. Some jurors could have concluded he committed fraud because his solicitors did not disclose high costs of fundraising, some could have convicted him because the donors were told their contributions were tax deductible, and some could have convicted him because they did not think the small percentage of money he actually spent on charity went for the precise types of charitable activities described by the telephone solicitors. If any one of these facts were alleged as a sentencing enhancement, surely this Court would require a

unanimous finding on any one of them before a higher sentence could be imposed, and yet in this case, no such requirement was imposed on the jury, and the Ninth Circuit held none was required.

Certiorari should be granted to impose a unanimity requirement in federal fraud cases consistent with this Court's Sixth Amendment jurisprudence as to other facts, besides the conviction itself, that can impact the maximum sentence the defendant faces.

Conclusion

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the Court of Appeals affirming Petitioner's conviction.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 9th day of April 2007.

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APPENDIX

Appendix 1

472 F.3d 1055

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Timothy James LYONS, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Gabriel Sanchez, Defendant-Appellant.
Nos. 04-50082, 04-50127.

Argued and Submitted March 8, 2006.
Filed July 17, 2006.
Amended Jan. 11, 2007.

Background: Defendants, operators of a charitable telemarketing operation, were convicted, in the United States District Court for the Central District of California, David O. Carter, J., of mail fraud and money laundering. They appealed.

Holdings: The Court of Appeals, McKeown, Circuit Judge, held that:

(1) defendants' First Amendment rights were not violated by government's introduction of evidence that 80% of donated funds went to third-party telemarketers;

(2) district court did not plainly err in failing to give special unanimity instruction to jury regarding government's theory of fraud;

(3) district court's failure to apply clear and convincing evidence standard to loss calculations did not require full resentencings; and

(4) district judge's comments to defense attorney did not warrant reassignment of case to different district judge on remand.

Affirmed in part and remanded in part.

Opinion, 453 F.3d 1222, superseded.

John H. Weston, Weston, Garrou & DeWitt, Los Angeles, CA; William J. Kopeny, William J. Kopeny & Associates, Irvine, CA, for the defendants-appellants.

Ellyn Marcus Lindsay, Assistant United States Attorney, Los Angeles, CA, for the plaintiff-appellee.

Appeal from the United States District Court for the Central District of California; David O. Carter, District Judge, Presiding. D.C. Nos. CR-02-00319-DOC-01, CR-02-00319-DOC-2.

Before SIDNEY R. THOMAS and M. MARGARET McKEOWN, Circuit Judges, and SAMUEL P. KING,******** Senior Judge.

******** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

Appendix 3

ORDER AMENDING OPINION AND AMENDED OPINION

McKEOWN, Circuit Judge.

ORDER

The Opinion filed on July 17, 2006, is amended as follows:

On slip Opinion page 7868, line 6: insert the following sentence after the citation to *United States v. Staten,* 450 F.3d 384, 386 (9th Cir.2006): The argument that the district court should have imposed a "beyond a reasonable doubt" standard is foreclosed by our case law.

On slip Opinion page 7868, line 7: delete the paragraph beginning "As Sanchez and Lyons did not raise this argument ..." and replace with the following text:

> In light of the disproportionate enhancement, the district court's failure to apply the clear and convincing evidence standard was plain error. *See United States v. Jordan,* 256 F.3d 922, 930-31 (9th Cir.2001) (holding failure to apply the appropriate standard affected substantial rights in circumstances similar to those presented here). Nonetheless, we decline to exercise our discretion to correct the error because the forfeited error does not result in a miscarriage of justice. *See United States v. Olano,* 507 U.S. 725, 736-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Clear and convincing evidence, including bank records, financial analyses, and Sanchez's own admissions, supports the loss calculation. Neither defendant is entitled to full resentencing.

With these amendments, the panel has voted to deny the petition for panel rehearing. Judges Thomas and McKeown vote to deny the petition for rehearing en banc and Judge King so recommends. The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R.App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for rehearing or rehearing en banc will be entertained.

OPINION

Rare is the person who relishes getting calls from those great patrons of the telephone, telemarketers.[1] Yet many charities, especially small, obscure or unpopular ones, could not fund their operations without telemarketers. Some professional telemarketers take the lion's share of solicited donations, sometimes requiring and receiving commission rates of up to 85%. Most donors would probably be shocked or surprised to learn that most of their contributions were going to for-profit telemarketers instead of charitable activities. But the Supreme Court has held that, under the First Amendment, the bare failure to disclose these high costs to donors cannot, by itself, support a fraud conviction. *Madigan v. Telemarketing*

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[1] One oft-repeated expression of the collective view of telemarketers is Jerry Seinfeld's response to a telemarketer's call:
[TELEMARKETER]: Hi. Would you be interested in switching over to TMI long-distance service[?]
SEINFELD: Oh, gee, I can't talk right now. Why don't you give me your home number and I'll call you later?....
[TELEMARKETER]: Well, I'm sorry. We're not allowed to do that.
SEINFELD: I guess you don't want people calling you at home.
[TELEMARKETER]: No.
SEINFELD: Well, now you know how I feel.
available at http:// transcripts.cnn.com/TRANSCRIPTS/0102/14/nr.00.html.

Assocs., Inc., 538 U.S. 600, 606, 123 S.Ct. 1829, 155 L.Ed.2d 793 (2003). Evidence of high fundraising costs may, nonetheless, support a fraud prosecution when "nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener." *Id.*

In this appeal we consider, among other things, under what circumstances the government may introduce high commission rates as evidence in a criminal fraud case. Timothy Lyons and Gabriel Sanchez challenge their convictions for mail fraud and money laundering on the basis that they never lied, and never asked the telemarketers in their employ to lie, about the fact that around 80% of donations to their charities were earmarked for telemarketing commissions.

Lyons and Sanchez did, however, misrepresent to donors how they spent contributions net of telemarketer commissions. Their undoing was not that the commissions were large but that their charitable web was a scam. Donors were told their contributions went to specific charitable activities when, in reality, almost no money did. We conclude that the government did not violate the First Amendment by introducing evidence that over 80% of donations went to telemarketers.

Lyons and Sanchez also claim non-constitutional error involving the admission of evidence and jury instructions. These claims lack merit. We affirm the convictions and order a limited remand pursuant to *United States v. Ameline*, 409 F.3d 1073, 1078-79 (9th Cir.2005) (en banc).

BACKGROUND

Appendix 6

I. FACTUAL BACKGROUND

We first describe the scheme Lyons and Sanchez devised, and then turn to the specific representations made to potential donors through both telemarketers and promotional pamphlets, and how Lyons and Sanchez actually spent the funds they received.

A. OVERVIEW OF THE SCHEME

Around early 1994, long-time friends Lyons and Sanchez decided to form a business in which Sanchez would run a church and Lyons would supervise telemarketers to raise money for the church. Sanchez formed the First Church of Life (FCL), which had no congregation, services or place of worship; its address belonged to the house of Sanchez's father. Lyons formed a fundraising company called North American Acquisitions (NAA).

In pursuit of their scheme, the pair created six charities under the FCL umbrella and selected names likely to attract sympathy and donations, including the AIDS Research Association, Children's Assistance Foundation, Cops and Sheriffs of America, Handicapped Youth Services, U.S. Firefighters, and U.S. Veterans League. None of these charities had infrastructure separate from FCL. The groups also had little if any actual contact with the people or causes they purported to support.

NAA outsourced most operations to third-party telemarketers to solicit donations on behalf of FCL's charities. Donors usually sent checks, made out to the

various FCL charities, to the telemarketers. On average, the telemarketers took 80% of the donated funds as commission. NAA kept another 10%, and the last 10% was deposited into the respective accounts of the six FCL charities. We explain later in greater detail how funds were distributed.

As a registered fundraiser, NAA filed annual financial reports with the State of California and disclosed all funds collected and all fees that went to the third-party telemarketers and NAA. By December 1997, FCL had lost its tax-exempt status in California, so Sanchez registered a new church in Nevada, Christian Outreach Ministries, through which he ran the six charities originally under the FCL umbrella.

In 1997, a California newspaper published articles calling Sanchez's operation a scam. Sanchez left Christian Outreach Ministries and began to work for NAA. The operation of the charities fell to other co-schemers.

Lyons and Sanchez went to Nevada, where they incorporated yet another church, Mercy Ministries, later renamed Glory Ministries. The church became the umbrella organization for six new charities, which inherited money and similar-sounding names from the old charities.[2]

In 2000, Lyons sold the assets of NAA to Roger Lane. According to his employees, Lyons kept operational control of NAA. Although employees were told to regard him as a consultant, Lyons was still in charge and actively involved.

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[2] For example, AIDS Research Association became Children's AIDS Council; Cops and Sheriffs of America became the Police and Sheriffs Support Fund; U.S. Firefighters became Firefighters Assistance Foundation.

B. SPECIFIC REPRESENTATIONS AND FUNDS SPENT

During the course of the scheme, Lyons and Sanchez raised over $6 million for the various causes. Out of these millions raised on behalf of the six FCL charities, very little was spent on charitable activities-according to the government, about $4,800.[3] This amount is small, even as a percentage of the net donations received after paying telemarketers' commissions. Most of the charities' funds actually went to Sanchez's personal expenses--home rent, car payments, loan payments, legal expenses, medical expenses, and credit card payments.

Nevertheless, Lyons and Sanchez wrote scripts for telemarketers to read to would-be donors, as well as promotional pamphlets, that suggested otherwise.[4] Every script and pamphlet mentioned a number of specific charitable activities purportedly funded by donors' contributions. We review in turn each of the six charities, what each charity promised, and what each charity actually delivered.

AIDS Research Association claimed that its goals were to

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[3] The bank records were incomplete because certain electronic media were unreadable. Sanchez argued at trial that all of the funds for which the bank had lost records went to charity. However, Sanchez agreed that of all the funds for which the bank could provide "hard and fast" numbers, less than $5,000 went to charitable activities.

[4] Sanchez testified that "I wrote the brochure information; and in later years, I believe it was something that Mr. Lyons would write and I would approve, modify, and I would come up with a product that was ... acceptable to both of us."

"provide funds to local A.I.D.S. hospitals to help find a cure or at least to help funding of drug programs which may enhance or lengthen the life of A.I.D.S. patients," and to "provide funds to local A.I.D.S. patients by giving in-home care or just helping out families when a person dies of A.I.D.S." No evidence indicates that the Association ever gave funds to hospitals, AIDS patients or their families. According to the government, the association raised $261,257 in 1998 and 1999 but spent no money at all on charitable activities.

Children's Assistance Foundation claimed that its goal was to "eventually open a facility [for] ... long term care for children and their families," and that its activities included "relocat[ing] entire families" and "helping children and their families ... by providing food, shelter, medical care, and simple family expenses." The group did not help multiple "families" or "children," though Sanchez himself provided exactly one woman and her child food and shelter for several months. The foundation raised $465,596 in 1998 and 1999, but could document spending just $100 on charitable activities.

Cops and Sheriffs of America claimed to finance "various crime prevention and drug awareness programs throughout the country" and provide police officers education on "state of the art" crime-fighting equipment and techniques. The group published a magazine annually containing paid advertisements. The charity changed its name to Police and Sheriff's Support Fund, which purported to provide free self-defense classes, financial support for neighborhood watch programs and "families of slain officers," and contributions

to "The National Law Enforcement Officers Memorial." Of its advertised activities, the Fund offered only a single self-defense class attended by a few NAA or FCL employees. The group raised $828,928 in 1998 and 1999, with only $400 spent on charitable activities.

Handicapped Youth Services purported to help provide "wheelchairs, crutches, walkers or any other equipment that these children may need but financially cannot afford," and to take handicapped children to "fairs, museums, and amusement parks to give some cheer to their lives." In 1998 and 1999, the charity raised $602,643. The group documented spending no money at all on charitable activities.

The pamphlet for U.S. Firefighters said that it funded "various fire prevention and awareness programs throughout the country," including the education of "professional and volunteer firefighters" on "state-of-the-art equipment and techniques of firefighting and fire prevention." Apparently, one person went to low income houses in Orange County on behalf of the group, installed fire extinguishers and smoke detectors, left information, and gave away 50-75 fire extinguishers. Nothing in the record suggests that any firefighters were educated. In 1998 and 1999, the group raised $752,270 but could document only $3,015 spent on its charitable activities.

U.S. Veteran's League claimed to provide clothing, food, shelter, and career counseling to homeless veterans and purported to have formed scholarships and grants for veterans. Employees of Sanchez and Lyons testified that the charity carried out none of these activities. The League

raised $955,806 in 1998 and 1999 but spent just $295 on charitable activities.

II. PROCEDURAL BACKGROUND

In October 2002, a grand jury charged Lyons and Sanchez, as well as Roger Lane and Steven Delatorre, with 33 counts of mail fraud, 11 counts of money laundering and one count of criminal forfeiture. Lane and Delatorre pleaded guilty just before trial.

At trial, the government introduced evidence of the misrepresentations Lyons and Sanchez made on behalf of each charity. The government introduced as exhibits the telemarketer scripts and promotional pamphlets prepared by Lyons and Sanchez, as described above. Donors testified as to what they were told by telemarketers. The government also explained how Lyons and Sanchez, through their scripts and pamphlets, had misrepresented the nonprofit status of FCL and its charities.[5]

Evidence of the high commissions taken by telemarketers and how donations were actually spent formed a backdrop for testimony about the charities. Former employees testified that very little money was spent on charitable work. Some testified that Sanchez did no work while at the office, where

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[5] The government noted that the materials authored by Lyons and Sanchez represented that the charities were registered § 501(c)(3) nonprofit organizations, and thus that any donations were tax deductible. The government argued that both Lyons and Sanchez knew that the basis for any tax exemptions was the fact that Sanchez called his organization a church, but that to receive a tax exemption, FCL had to apply for an exemption and receive formal recognition from the IRS. Lyons and Sanchez never sought formal approval of the organization's claimed nonprofit tax status.

he talked on the telephone and played video games. Former employees also testified that they had asked Lyons and Sanchez what precise charitable activities FCL engaged in. Lyons admitted to an employee that FCL and its progeny did nothing for charity, and Sanchez told another employee that it was none of her business what he did for charity.

The government presented pie-charts that summarized the bank records of each of the six charities and how they spent donations received. Each chart showed the total donations raised by each of the charities over roughly two years, between 1998 and 1999. For instance, the chart for Handicapped Youth Services showed that, from late 1997 to November 1999, the organization received $602,643 in donations. Of this amount, the chart showed that $520,313 or 85% went to NAA, and that $19,519 eventually went to a new account for Disabled Children's Charity (the second generation incarnation of Handicapped Youth Services). Of the $46,655 available for the charity to spend on its activities not including returned deposits and funds for which records are missing, the government's chart reflected that $0 was spent on charitable activities. The government explained that Sanchez actually spent the $46,655 on his own expenses, including his own sports car, house rent, legal fees unrelated to NAA or FCL, and personal medical bills.

Throughout the trial, as a foundation for its explanation that the charities established by Lyons and Sanchez spent almost no money on charitable activities, the government referred to the high commissions taken by telemarketers. The government's opening argument is fairly representative of the way it treated the high telemarketer commission rate

throughout the trial:

> I'd like to talk now a moment about the money.
> You will hear during the course of this trial that out of every dollar raised from donors, 85 to 90 percent went to N.A.A., defendant Lyon's company. Not a dollar of that money ... went for any charitable purpose whatsoever.
> Now, out of that money, ... 75 to 80 percent went to professional telemarketers. The rates varied depending on the firm. And he kept the rest himself. He used it to pay his salary, his personal expenses
> ....
> Now, that leaves us with 10 percent approximately. That 10 percent was ... deposited into an account under the name of the purported charity; for example, the Handicapped Youth Services account.
> Those accounts were under the control of defendant Sanchez.
> But of this money ... you will hear that the vast majority of it went into the pockets of defendant Sanchez and those that worked for him--went to pay for their business expenses, their personal expenses, and other items. Virtually no money went for any charitable purpose whatsoever.

In November 2003, after a two-day trial, the district court instructed the jury on the elements of mail fraud, co-schemer liability, and the relevance of high fund-raising costs to fraud:

> In order for the defendant to be found guilt[y] of mail fraud as charged in counts 1 through 33 ... [in violation of 18 U.S.C. § 1341], the government must prove each of the

following elements beyond a reasonable doubt:
First, the defendant knowingly devised or knowingly participated in a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;
Second, the defendant knew that the promises or statements were false;
Third, the promises or statements made or facts omitted were material, that is, they would reasonably influence a person to part with money or property;
Fourth, the defendant acted with the intent to defraud; and
Fifth, the defendant used or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme.

....

The phrases "scheme to defraud" and "scheme to obtain money or funds" mean any deliberate plan of action or course of conduct by which someone intends to deceive or to cheat another, or by which someone intends to deprive another of something of value.

....

The term "false or fraudulent pretenses, representations, or promises" includes actual direct false statements and includes the knowing concealment of facts that are material to the matter in question that were made or used with the intent to defraud.

....

Each member of a scheme to defraud may be responsible for the actions of the other co-schemers performed during the course of and in furtherance of the scheme. A defendant is responsible for a co-schemer's fraudulent acts if:

One, the defendant himself was a member of the scheme to defraud;
Second, the defendant had the intent to defraud;
Third, the acts of co-schemers were performed during the course of and in furtherance of the scheme; and
Fourth, the defendant personally made up or participated in the scheme.
High fund-raising costs without more do not establish fraud. And mere failure to volunteer the fund-raiser's fee when contacting a potential donee without more is insufficient to establish fraud.

The jury convicted Lyons and Sanchez on all mail fraud and money laundering counts. The district court denied Lyons' motion for a new trial and directed verdict. Lyons and Sanchez were each sentenced to 180 months in prison and three years of supervised release.

ANALYSIS

Lyons and Sanchez challenge their convictions on constitutional and evidentiary grounds. They also argue that if their convictions stand, they are entitled to a remand under *Ameline,* if not full resentencings. Sanchez alone requests a remand to a different district judge.

I. FIRST AMENDMENT AND FUNDRAISING COSTS

Lyons and Sanchez argue that their mail fraud convictions

violated the First Amendment[6] because the district court allowed the government to use the high cost of fundraising as evidence of fraud even though they had not affirmatively misrepresented the cost of fundraising to donors. They raise a cluster of closely-related arguments, all premised on a similar misreading of *Madigan.*

Madigan established a default rule in criminal prosecutions for fraud involving telemarketing: the "bare failure to disclose [the high cost of fundraising] directly to potential donors does not suffice to establish fraud." 538 U.S. at 606, 123 S.Ct. 1829. That is, the mere fact that a telemarketer keeps 85% of contributions it solicits cannot be the basis of a fraud conviction, and neither can the fact that a telemarketer fails to volunteer this information to would-be donors. This fund-raising safe harbor stems from a trio of Supreme Court cases that barred states from adopting non-criminal regulations either (1) limiting the percentage of donations fundraisers (usually telemarketers) may take, or (2) requiring fundraisers to tell would-be donors about the percentage commission taken by fundraisers. *See Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 784-87, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 950-54, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984); *Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 622-28, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). The Supreme Court articulated the First Amendment concern at stake in these fundraising cases this way: "Our prior cases teach that the solicitation of charitable contributions is

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[6] Constitutional issues are reviewed de novo. *Buono v. Norton,* 371 F.3d 543, 548 (9th Cir.2004). A constitutional error is only harmless if it is harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud." *Riley,* 487 U.S. at 789, 108 S.Ct. 2667.

The limit of this principle may be seen in *Madigan's* holding that when "nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener," the high cost of fundraising may be introduced as evidence of fraud in a criminal case. 538 U.S. at 606, 123 S.Ct. 1829. *Riley* foreshadowed this result by noting that fraud prosecutions were "narrowly tailored" enough to be in "keeping with First Amendment directives," and that "the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements." 487 U.S. at 800, 108 S.Ct. 2667.

Lyons and Sanchez urge an extremely narrow view of *Madigan,* arguing that "*Madigan* held that if the fundraiser affirmatively misrepresented the costs of the fundraising, *then, and only then,* evidence of the costs might be utilized to demonstrate the fraudulent nature of any specific misrepresentations." (Emphasis added). The apparent basis for this argument is that in *Madigan,* the defendants directly lied to donors about the percentage of donations that went to charitable activities as opposed to fundraising.[7] Thus, Lyons

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[7] In *Madigan,* most donors were told that "a *significant* amount of each dollar donated would be paid over" to the charity. 538 U.S. at 605, 123 S.Ct. 1829 (emphasis added). One donor was even told that 90% of her donation would go directly to the charity; yet another was told that no funds would go to labor expenses because " 'all members [were] volunteers.' " *Id.* at 608, 123 S.Ct. 1829.

and Sanchez urge that unless the government could show that they lied to donors about how much the telemarketers would receive, the government was barred from introducing evidence of the high commissions paid to telemarketers.

Madigan's reach is not as narrow as Lyons and Sanchez suggest: "So long as the emphasis [in the arguments made by the prosecution] is on what the fundraisers misleadingly convey, and not on percentage limitations on solicitors' fees *per se,* such actions need not impermissibly chill protected speech." *Madigan,* 538 U.S. at 619, 123 S.Ct. 1829. The Supreme Court emphasized that "the First Amendment ... case law emphatically do[es] not require ... a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations." *Id.* at 621, 123 S.Ct. 1829. *Madigan* underscores that the state faces a high burden to demonstrate fraud, including the burden to prove that a defendant made knowing misrepresentations with the intent to defraud. *See id.* at 620, 123 S.Ct. 1829. Thus, "[e]xacting proof requirements of this order, in other contexts, have been held to provide sufficient breathing room for protected speech." *Id.* (citing, inter alia, *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).

In *Madigan,* the defendants not only misrepresented the percentage of funds going to telemarketers, they also made false promises about how donations--even net of telemarketers' fees--were to be spent. Telemarketers "told prospective donors their contributions would be used for specifically identified charitable endeavors," such as food baskets, job training, rent and bill payments, and

rehabilitation for veterans of the Vietnam War, even though donations did not pay for these activities. *Id.* at 608, 123 S.Ct. 1829. The government alleged that, even taking into account the fact that fundraisers received 85% of donations, the charity itself spent only 3% of all funds (or only 20% of net donation proceeds) on providing charitable services. *See id.* at 607 n. 1, 123 S.Ct. 1829. The indictment charged that "the charitable solicitation was a facade" because "[a]lthough [the fundraisers] represented that donated funds would go to [the charity's] specific charitable purposes, the amount of funds being paid over to the charity was merely incidental to the fund raising effort, which was made for the private pecuniary benefit" of the fundraisers and their agents. *Id.* at 618-19, 123 S.Ct. 1829 (internal citations and quotation marks omitted).

With respect to Lyons and Sanchez, the government both alleged in its indictment and offered evidence at trial of specific misrepresentations and omissions they made regarding the use of donated funds. Specifically, the government's evidence underscored the fact that virtually none of the money that ended up in the bank accounts of the six FCL charities went to any charitable activities at all, let alone the specific charitable activities mentioned in the telemarketers' calls or promotional pamphlets. These misrepresentations are nearly identical to the specific misrepresentations at issue in *Madigan*. *See id.* at 607 n. 1, 123 S.Ct. 1829 (misrepresenting that significant part of donations actually went to charitable activity when, even net of fundraising costs, very little did); *id.* at 608, 123 S.Ct. 1829 (representing that donations would fund specific charitable activities for Vietnam veterans that were never

carried out).

Neither *Madigan* nor the First Amendment insulates defendants from criminal prosecution for fraudulent misrepresentations about their charitable endeavors. Rather, the government is constrained from charging that high fundraising costs *per se* are tantamount to fraud. Our case is much like *Madigan.* The fraud is banded by the blatant misrepresentations about the charities. However, admission of evidence regarding the fundraising costs was essential to understanding the overall scheme and the shell game of the multiple charities. The government did not violate Lyons' or Sanchez's First Amendment rights by introducing evidence that third-party telemarketers received 80% of funds donated to the various FCL charities because the government had also shown that Lyons and Sanchez, through their respective organizations, had made fraudulent misrepresentations regarding disposition of the charitable funds.

II. Rule 403 And Fundraising Costs

Lyons and Sanchez argue that the government's repeated emphasis throughout the trial on the cost of fundraising, specifically the high commissions received by telemarketers, constituted "unfair prejudice" substantially outweighing its probative value under Federal Rule of Evidence 403.[8] Under Rule 403, "unfair prejudice" is "an undue tendency to suggest decision on an improper basis." Rule 403 Advisory

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[8] Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Committee Notes. We review the district court's Rule 403 decisions for abuse of discretion. *United States v. Leon-Reyes,* 177 F.3d 816, 821 (9th Cir.1999).

Relying on selective excerpts from the record, Lyons and Sanchez claim that the government repeatedly emphasized the high commissions taken by third-party telemarketers, as if this fact alone were sufficient to sustain a fraud conviction. A review of the record and trial as a whole shows the government did not solely or relentlessly focus on the high cost of fundraising to prove fraud. To be sure, the government asked many witnesses about the high fundraising costs, but the vast bulk of questions concerned misrepresentations or FCL's failure to apply donated funds to charitable purposes. Nor was the high commission rate itself a basis of the government's fraud case. Rather, the commission was a legitimate expense and part of the overall picture of how the money was allocated. [9]

Just as the government could not demonstrate fraud simply by showing that 80-90% of contributions went to telemarketing fees instead of charity, neither could it prove fraud solely by showing that 10-20% of donations were not spent on charity, without showing what happened to the remaining 80-90% of the funds.

The evidence is overwhelming that between telemarketers'

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[9] *See Madigan,* 538 U.S. at 625, 123 S.Ct. 1829 (Scalia, J., concurring) ("[T]here can in general be no reasonable expectation on the part of donors as to what fraction of the gross proceeds goes to expenses....[O]ne who is promised, without further specification, that his charitable contribution will go to a particular cause must reasonably understand that it will go there *after* the deduction of legitimate expenses ....") (emphasis in original).

fees and Lyons' and Sanchez's personal expenses, the six FCL charities spent virtually no money on charitable activities promised to donors. The district court did not abuse its discretion in overruling the Rule 403 objections regarding fundraising costs.[10]

III. JURY INSTRUCTIONS

Lyons and Sanchez argue that the district court made four discrete errors, failing to instruct the jury (1) as to the proper scope of *Madigan;* (2) to be unanimous on the particular false representations made by Lyons or Sanchez; (3) to be unanimous on the theory of mail fraud because the government allegedly offered two theories (false representations or scheme to defraud); and (4) as to the correct elements of co-schemer liability. We review de novo whether the district court's jury instructions accurately stated the law. *United States v. Stapleton,* 293 F.3d 1111, 1114 (9th Cir.2002).

A. *Madigan*

The following was, in relevant part, the district court's jury instruction as to the rule in *Madigan:* "High fund-raising costs without more do not establish fraud. And mere failure to volunteer the fund-raiser's fee when contacting a potential donee without more is insufficient to establish fraud."

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[10] Sanchez alone argued Rule 403 prejudice as to the admission of evidence on how he spent donated funds net of fundraising costs--about $700,000. Sanchez attempts to blur the distinction between fundraising costs and net charity proceeds; the latter is definitely probative as to the claimed fraud here. *Madigan* and the First Amendment surely do not preclude a district court from admitting evidence of how charitable funds, *net* of fundraising fees, are spent. *See* 538 U.S. at 607 n. 1, 123 S.Ct. 1829.

According to Lyons and Sanchez, the jury instruction allowed the jury to believe that it could convict based on the confluence of these two facts that, taken independently, could not support a fraud conviction. That is, they claim the jury could have convicted based on high fundraising costs *and* the failure to volunteer information about fundraising costs to donors.

Lyons and Sanchez posit that the district court should have "directed the jury not to consider the high fundraising costs as any evidence of fraud *whatsoever.*" Alternately, they propose that the instruction "should have told the jury that neither evidence of high fundraising costs nor evidence that such costs were not gratuitously disclosed, *nor any combination of both,* could be deemed any evidence of fraud absent *proof* of misrepresentations of these costs."

The difficulty with their challenge is that the court's instruction was a nearly verbatim quotation from *Madigan. See* 538 U.S. at 624, 123 S.Ct. 1829. It is difficult to understand the claim that the jury instruction was "flatly prohibited by the Supreme Court in *Madigan* " when the instruction quite appropriately quoted the controlling law.

B. UNANIMITY AS TO A PARTICULAR FALSE PROMISE

Both Lyons and Sanchez claim that the district court should have instructed the jury that, to convict on mail fraud, it had to agree unanimously on the particular false promise or statement made by the defendants. Thus, according to Lyons and Sanchez, different members of the jury could have

convicted them based on different false promises. For instance, some jurors may have decided to convict because Handicapped Youth Services did not provide wheelchairs to handicapped children as pamphlets promised, while other jurors may have convicted because the AIDS Research Association failed to provide any funds to hospitals or AIDS patients.

This argument is foreclosed by a long line of cases; the jury need not be unanimous on the particular false promise. *See, e.g., United States v. Woods,* 335 F.3d 993, 998-99 (9th Cir.2003) ("Under the mail fraud statute the government is not required to prove any particular false statement was made."). The district court instruction was proper.

C. UNANIMITY AS TO THE THEORY OF FRAUD

The next challenge to the jury instructions is that the district court should have instructed the jury to be unanimous on the *theory* of fraud. Lyons and Sanchez claim that the instructions given suggest two conceptually distinct theories of mail fraud liability: the "scheme to defraud" theory and the specific misrepresentation theory. Because this issue was not raised at trial, we review for plain error. *United States v. Sanders,* 421 F.3d 1044, 1050 (9th Cir.2005).

Ordinarily, the "general unanimity instruction suffices to instruct the jury that they must be unanimous on whatever specifications form the basis of the guilty verdict." *United States v. Kim,* 196 F.3d 1079, 1082 (9th Cir.1999). A specific unanimity instruction is required if it appears that there is a "genuine possibility of jury confusion or that a

conviction may occur as the result of different jurors concluding that the defendant committed different acts." *Id.* (citing *United States v. Anguiano,* 873 F.2d 1314, 1319 (9th Cir.1989)) (internal quotation marks omitted).

Nothing here suggests the jury might have been confused, nor do Lyons and Sanchez offer any evidence to suggest this was the case. *See United States v. Mastelotto,* 717 F.2d 1238, 1247 (9th Cir.1983) (requiring special unanimity instruction when "a variance occurred between the single scheme charged in each count of the indictment and the proof at trial" which indicated the existence of two schemes). Most importantly, though, the government did not present two "theories" of fraud. Lyons and Sanchez have miscast the jury instructions and created a false dichotomy between a "scheme to defraud" theory and a "false promises" theory. The jury instruction provided that, to prove mail fraud under 18 U.S.C. § 1341, the government was required to show that a "defendant knowingly devised or knowingly participated in *a scheme or plan to defraud,* or a *scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations or promises* ...." (emphasis added).

Thus, the "alternate" theories actually *both* involve schemes or plans. The jury instruction as given simply did not provide for mail fraud liability in the absence of a unifying scheme or plan. By following this instruction, the jury could not have convicted Lyons and Sanchez for making false promises in the abstract.

In any case, jurors need not be unanimous as to a particular theory of liability so long as they are unanimous that the

defendant has committed the underlying substantive offense. *Kim,* 196 F.3d at 1083 ("[I]t was not necessary for the jurors in this case to unanimously agree on a specific classification of Kim's conduct.").[11] Here, the "scheme or plan to defraud" and "scheme or plan for obtaining money or property by means of false or fraudulent pretenses" both involve the same underlying statutory offense, a violation of 18 U.S.C. § 1341.

Finally, sufficient evidence presented at trial showed that both Lyons and Sanchez had *both* devised a scheme to defraud donors and a scheme to obtain money by false pretenses. Under these circumstances, the district court did not commit plain error. *See United States v. Fredette,* 315 F.3d 1235, 1243 (10th Cir.2003) (finding no plain error when the district court issued general unanimity instruction and "ample evidence" showed that defendant "*both* devised a scheme to defraud customers and dealers *and* devised a scheme to obtain money by false pretenses.") (emphasis in original).

D. CO-SCHEMER LIABILITY

We next consider the final challenge to the jury instructions, namely that the district court did not instruct the jury as to all the elements of co-schemer liability. The district court instructed that to convict on co-schemer liability, the jury had

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[11] FN11. *See also Schad v. Arizona,* 501 U.S. 624, 631-32, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) ("We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone. In these cases, as in litigation generally, different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.") (internal citations and quotation marks omitted).

to find that (1) defendant was a member of the scheme; (2) he acted with intent to defraud; (3) the acts of the co-schemer were during and in furtherance of the scheme; and (4) defendant participated in the scheme. The district court did not instruct the jury that, for a defendant to be vicariously liable for the acts of his co-schemers, those acts must have been reasonably foreseeable and in furtherance of the scheme. *See United States v. Tarallo,* 380 F.3d 1174, 1184 (9th Cir.2004).

The government argues that foreseeability is not an element of co-schemer liability. But the very case it cites, *Stapleton,* indicates that jury instructions must "limit[ ] vicarious liability to acts of co-schemers during the life of the scheme and *acts that were reasonably foreseeable* as a necessary and natural consequence of the fraudulent scheme." 293 F.3d at 1118 (emphasis added). *Stapleton* affirmed jury instructions that explicitly made foreseeability an element of co-schemer liability. *Id.* at 1115-16 ("For a defendant to be found guilty of an offense allegedly committed by a coschemer as part of the scheme, the offense must be one which would *reasonably have been foreseen* to be a necessary and natural consequence of the scheme to defraud.") (emphasis added and original bolding omitted). Thus, the district court erred by not instructing the jury that foreseeability is an element of co-schemer liability.

The question, then, is the effect of this instructional error. Although this instruction was not challenged at trial, the error was not plain and did not affect the substantial rights of either Lyons or Sanchez. *See Sanders,* 421 F.3d at 1050.

Lyons seeks to distance himself from co-schemer liability for any misrepresentations in the brochures for charities, Counts 13-33, all of which he argues were created after he had sold his business to co-schemer Roger Lane. But Lyons was still an active participant in the scheme, including the drafting of fraudulent pamphlets, long after he sold his business. Lyons not only authored the brochures, he was still in charge of NAA after Lane's purchase. Because Lyons was still actively participating in the fraud alleged, "foreseeability" was not an issue, and the district court's error was not plain and did not affect Lyons' substantial rights. *See Stapleton,* 293 F.3d at 1117 (noting that a defendant may only be vicariously liable for the acts of co-schemers that "occurred during the defendant's knowing participation or [were] an inevitable consequence of actions taken while the defendant was a knowing participant").

As was the case with Lyons, many of the mail fraud counts against Sanchez are based on Sanchez's active participation in the scheme to defraud. They thus involve his liability as a principal.[12] The remaining counts in the indictment involve actions in furtherance of the fraudulent scheme that were reasonably foreseeable. The counts of mail fraud relating to

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[12] Sanchez asserts that "[e]ach of the fraud counts is based on the conduct of the telemarketers," and that the jury should have been instructed that he was only vicariously liable if the telemarketers were co-schemers, since he never personally lied to donors. His argument misapprehends how the indictment alleged mail fraud. None of the mail fraud counts corresponds with misrepresentations by telemarketers. The indictment alleges a scheme to defraud in which Sanchez participated. Each of the 33 counts of mail fraud is based on a separate mailing in furtherance of the scheme to defraud--mostly packages from NAA containing commission checks and supplies. Sanchez also suggests that any fraud stemmed from unscripted lies told by telemarketers, but the indictment does not charge Sanchez with being liable for any unscripted lies told by telemarketers.

actions that took place after Sanchez left the scheme in late 2000 charged Sanchez with actions executed by co-schemers in accord with his explicit instructions. Mail fraud that took place after 2000, then, was "an inevitable consequence of actions taken while [Sanchez] was a knowing participant" in the scheme to defraud. *Id.* Thus the district court's error was not plain and did not affect Sanchez's substantial rights.

IV. SENTENCING

Lyons and Sanchez request limited remands pursuant to *Ameline,* 409 F.3d at 1078-79. The government acknowledges that remand is appropriate and we grant the requests.

Lyons and Sanchez go a step further and ask for full resentencings because the district court should have applied the "beyond a reasonable doubt" standard to facts, aside from prior convictions, used for sentencing enhancement. Sanchez in particular argues that the loss calculations used to raise his sentence were not proven by clear and convincing evidence.

[17] Generally, the pre-*Booker* standards of proof apply to sentencing, *see United States v. Dare,* 425 F.3d 634, 642 (9th Cir.2005) ("[T]he preponderance of the evidence standard is the appropriate standard for factual findings used for sentencing."), though we have held that "the clear and convincing standard still obtains for an enhancement with an extremely disproportionate effect, even though the enhancement now results in the calculation of an advisory rather than a mandatory Guidelines sentence." *United States v. Staten,* 450 F.3d 384, 385 (9th Cir.2006). The argument

that the district court should have imposed a "beyond a reasonable doubt" standard is foreclosed by our case law.

[18] In light of the disproportionate enhancement, the district court's failure to apply the clear and convincing evidence standard was plain error. *See United States v. Jordan,* 256 F.3d 922, 930-31 (9th Cir.2001) (holding failure to apply the appropriate standard affected substantial rights in circumstances similar to those presented here). Nonetheless, we decline to exercise our discretion to correct the error because the forfeited error does not result in a miscarriage of justice. *See United States v. Olano,* 507 U.S. 725, 736-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Clear and convincing evidence, including bank records, financial analyses, and Sanchez's own admissions, supports the loss calculation. Neither defendant is entitled to full resentencing.

V. REASSIGNMENT OF DISTRICT JUDGE

[19] Sanchez alone has asked to be assigned to a different judge on remand, under 28 U.S.C. § 2106,[13] because "the district judge *does not like* Appellant." Actually, the tension appeared to be with Sanchez's attorney, not Sanchez himself, and nothing in the record supports an allegation of bias against Sanchez.

After Sanchez's counsel raised several objections that the

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[13] Section 2106 provides: "[A]ny ... court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

district judge seemed to find particularly objectionable, the judge noted his displeasure with Sanchez's counsel: "I control this courtroom. Do you understand that?" The judge stated that counsel's objections were not inadvertent error, refused counsel's apology, told him to object properly, and made the following comments to Sanchez's counsel in front of both defendants:

> I don't believe you. It's willful, and I will resolve this for you. I'm warning you. And by the time they fish your client out of prison, if he is convicted--and even if I'm overturned in terms of something I say in front of the jury, it will be years. So don't press me on it counsel. We are done with this discussion now. Have a nice lunch.

The government identifies no context or other facts that help drain the sting from the judge's comments. Nevertheless, Sanchez points to no other examples of purported bias by the district judge. These few comments alone do not justify reassignment of this case.

[20] We may remand to a different district judge if a party can show personal biases or unusual circumstances, based on an assessment of three factors: (1) whether on remand the district judge can be expected to follow this court's dictates; (2) whether reassignment is advisable to maintain the appearance of justice; and (3) whether reassignment risks undue waste and duplication. *United States v. Peyton,* 353 F.3d 1080, 1091 (9th Cir.2003).

Sanchez prevails on none of these factors. Nothing suggests that the district judge would fail to follow this court's mandate, even if it had been favorable to Sanchez. Nor do

we believe that these comments will affect the fairness of proceedings on limited remand. We also have no reason to believe that reassignment is needed to maintain the appearance of justice. Even after this limited exchange, the district judge made rulings favorable to Sanchez, departing downward on his criminal history score and refusing to impose a two-level enhancement for obstruction of justice, as requested by the government. Finally, as the government notes, reassignment would result in undue waste and duplication, particularly given the long procedural history of the case and complexity of issues involved.

AFFIRMED in part; **REMANDED** in part pursuant to *Ameline.*

Appendix 33

United States District Court
Central District of California

Docket No. SA CR02-319 DOC

UNITED STATES OF AMERICA
vs.
GABRIEL BERNARDO SANCHEZ

Defendant Social Security No. 561-75-8434
akas: None

Residence:	Mailing address:
Santa Ana City Jail	20232 Wind Cave Lane
62 Civic Center Plaza	Huntington Beach, CA
Santa Ana, CA 92701	92646-5341

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

		MONTH	DAY	YEAR
		03	08	2004
COUNSEL	X	WITH COUNSEL		
		William J. Kopeny, Retained		

PLEA [X] NOT GUILTY,

Appendix 34

USA vs. GABRIEL BERNARDO SANCHEZ
Docket No.: SA CR02-319 DOC

FINDING

There being a finding/verdict of X **GUILTY**, defendant has been convicted as charged of the offense(s) of: 18 USC 1341, 2: Mail Fraud, Aiding and Abetting, and Causing an Act to be Done (Counts 1-33), Class D Felony; 18 USC 1956(a)(1)(A)(i), 2: Money Laundering, Aiding and Abetting, and Causing an Act to be Done (Counts 34-44), Class C Felonies.

JUDGMENT AND PROB/COMM ORDER

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary
was shown, or appeared to the Court, the Court adjudged the defendant
guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is here committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

It is ordered that the defendant shall pay to the United States a special assessment of $4,400.00.

Pursuant to 18 USC 3663A(c)(3), restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable.

It is ordered that the defendant shall pay to the United States a total fine of $25,000.00. A sum of $15,000 shall be paid within six months of this judgment. Payment of the balance

USA vs. GABRIEL BERNARDO SANCHEZ
Docket No.: SA CR02-319 DOC

shall be due during the period of imprisonment, as directed by the Court or the United States Attorney, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program. If any amount of the fine remains unpaid after release from custody, monthly payments of $300.00 shall be made during the period of supervised release. These payments shall begin 30 days after the commencement of supervision.

Pursuant to 18 USC 3612(f)(3)(A), interest on the fine is waived as it is found that the defendant does not have the ability to pay interest. Payments may be subject to penalties for default and delinquency pursuant to 18 USC 3612(g).

The defendant shall comply with General Order No. 01-05.

cc: PSA; USPO; USM; Fiscal

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Gabriel Bernardo Sanchez, is hereby committed on Counts 1-12 and 34-44 of the Indictment to the custody of the Bureau of Prisons to be imprisoned for a term of 135 months. This term consists of 60 months on each of Counts 1-12 and 135 months on each of Counts 34-44, all such terms to be served concurrently to each other and concurrently to all other counts.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Gabriel Bernardo Sanchez, is hereby committed on Counts 13-30 of the Indictment to the custody of the Bureau of Prisons to be imprisoned for a term of 165 months. This term consists of

45 months on Count 13 and 60 months on each of Counts 14-30. Counts 15-30 shall be served concurrently to each other and concurrently to all other counts. Count 13 shall be served consecutively to Count 14 which shall be served consecutively to Counts 15-30.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Gabriel Bernardo Sanchez, is hereby committed on Counts 31-33 of the Indictment to the custody of the Bureau of Prisons to be imprisoned for a term of 180 months. This term consists of 60 months on each of Counts 31-33, to be served consecutively to each other but concurrently to all other counts.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. This term consists of three years on each of Counts 1 through 44 of the Indictment, all such terms to run concurrently under the following terms and conditions: (1) The defendant shall comply with the rules and regulations of the U.S. Probation Office and General Order 318; (2) The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at lease two periodic drug tests thereafter, as directed b the Probation Officer. The defendant shall abstain from using illicit drugs, using alcohol, and abusing prescription medications during the period of supervision; (3) During the period of community supervision the defendant shall pay the special assessment and fine in accordance with this judgment's orders pertaining to such payment; (4) The defendant shall not engage, as whole or partial owner, employee or otherwise, in any business involving loan programs, investment programs, or telemarketing activities of any kind, or any other business

involving the solicitation of funds or cold-calls to customers. Further, the defendant shall provide the Probation Officer with access to any and all business records, client lists, and other records pertaining to the operation of any business owned, in whole or in part, by the defendant, as directed by the Probation Officer; (5) The defendant shall submit person and property to search or seizure at any time of the day or night by any law enforcement officers, with or without a warrant; (6) The defendant shall not possess, have under his control or have access to any firearm, explosive device, or other dangerous weapon, as defined by federal, state or local law.

Court **RECOMMENDS** that the defendant be housed at the Lompoc or Taft facility, or in the alternative, the Southern California area due to close family ties.

Court further orders bond exonerated.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and ta any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Corrections

Center.

David O. Carter

March 9, 2004 _____

Date David O. Carter, U.S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Sherri R. Carter, Clerk

March 9, 2004 By /s/

Filed Date Deputy Clerk